ORIGINAL

STATE OF MICHIGAN
Appeal from the Michigan Court of Appeals

[O'Connell, P.J., Sawyer, J. and Talbot, JJ.]

_____/

PATRICK J. KENNEY,

Plaintiff-Appellant,

v

WARDEN RAYMOND BOOKER,

Defendant-Appellee.

_____/

Supreme Court No. 145116

Court of Appeals No. 304900

Wayne Circuit Court
No. 11-003828-AH

PLAINTIFF-APPELLANT'S SUPPLEMENTAL BRIEF PURSUANT TO THE COURT'S APRIL 29, 2013 ORDER

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SUPPLEMENTAL STATEMENT OF FACTS

On April 29, 2013, this Court issued an order instructing the parties to file supplemental briefs about whether various events rendered, or may soon render, the issues presented on appeal moot. For the following reasons, Plaintiff's habeas action is not moot and will not soon become moot.

Plaintiff was first paroled on October 4, 2005. (Supplemental Appendix (SA) p. 1.) Upon being paroled, Mr. Kenney was furnished with a prisoner pre-release notice (CSJ-290) which warned him he would receive a 60 month "flop" for any firearms violation of parole. It provided:

> If you violate your parole granted by the Michigan Parole Board by owning or possessing a firearm or imitation of a firearm, or are in company of anyone you know to possess these items, without prior permission from your agent, your parole will be revoked and you will serve an additional 60 months in prison for the violation.

(SA p. 2.)

After his 2005 release on parole, Mr. Kenney was charged with parole violation for various firearms violations for a pistol found in the car he was driving on November 26, 2007, along with a charge of a single failure to report to his parole officer on November 7, 2007. On January 30, 2008, when he was arraigned on the parole violation charges, Kenney pleaded guilty to the single failure to report and not guilty to the balance of the charges. (SA p. 3.) Notably, the parole violation warrant was not issued until January 17, 2008, well after Plaintiff had been taken into custody on November 26, 2007, on the gun charge (SA p.1).

Kenney's original revocation hearing occurred on March 26, 2008. Kenney was subsequently found guilty of the gun charges, his parole was revoked and he received

a 60 month sentence, just as provided in form CSJ-290. That revocation was set aside in Kenney's first habeas action for the government's failure to produce exculpatory evidence and a new hearing was ordered. That order setting aside the March 26, 2008, revocation was never appealed and is not part of the case pending before the Court.

Mr. Kenney's second parole revocation hearing occurred on November 18, 2010, and January 11, 2011. (At the new hearing, he did not plead guilty to the count of failure to report, having already done so three years prior.) On February 22, 2011, the parole board revoked Plaintiff's parole. MCL 291.740a(6) requires the parole board to list their findings and reasons for parole revocation, as does Administrative Regulation 791.7765 and MDOC Policy Directive 06.06.100(AA). This is done in a form order entitled "Parole Board Notice Of Action". The February 22, 2011, notice of action, under the section "Reason in Support of Parole Board Action" provided, "the firearms violation shows a high potential of risk to the public." No other reason for the parole revocation was given. (SA p. 9.) However, in the 2011 notice of action, Kenney's sentence was reduced from 60 months to 24 months, which meant he was immediately eligible for parole.

Prior to being released on parole, Kenney filed a second habeas corpus action asserting again that his parole was invalidly revoked. Kenney also asserted that since there was no basis for the revocation, and since he had wrongfully served over three years in prison, he was entitled to be released and discharged from parole. The trial court agreed that there was no basis for the revocation, and when exercising its discretion to fashion an appropriate habeas corpus remedy, discharged Kenney from parole.

While the second habeas action was pending, Mr. Kenney's parole was reinstated on June 1, 2011. Since that time, he failed to report to his parole officer on at least two occasions. As a result of the first failure to report, Mr. Kenney turned himself in. His parole was not revoked but he was given 30 days at the Detroit Re-Entry Center (DRC) as a sanction. (SA, p. 10, Affidavit of Counsel Kevin Ernst.) As a result of the other failure to report, Mr. Kenney turned himself in to his parole officer on April 26, 2013. Again, his parole was not revoked, and he received another 30 day sanction which he is currently serving, to be followed by residential treatment. (SA, p. 11, OTIS report.)

Plaintiff was originally given a 24 month term after being released on parole on June 1, 2011. MCL 791.236(3) confers on the parole board discretion to amend the term without a hearing. Since his June 1, 2011, release, the terms of Mr. Kenney's parole were amended and his discharge date was extended to April 1, 2014. (SA p. 11 OTIS report.)

ARGUMENT

I. PLAINTIFF'S CASE IS NOT MOOT BECAUSE HE IS ASSERTING THAT HE SHOULD NO LONGER BE ON PAROLE AND IS CHALLENGING THE VALIDITY OF THE PAROLE BOARD'S ACTIONS SINCE APRIL 18, 2008, WHEN HE SHOULD HAVE BEEN DISCHARGED. THUS, THE PAROLE BOARD NO LONGER HAD VALID CUSTODY OVER HIM AND PLAINTIFF IS ASSERTING THAT HE NO LONGER IS A PAROLEE.

Generally, in the habeas context, a case becomes moot only when the plaintiff is no longer in custody and the relief available or requested in the petition would not help him free him from the restraint under which he is held. See e.g., *Gavin v. Wells*, 914 F.2d 97, 98 (6th Cir. 1990) (one ceases to be in custody only after one's sentence has fully expired and there is no showing of present restraint flowing from the challenged action).

In *In re Halley*, 327 Mich. 222, 223-24 (1950), this Court stated:

> [T]he defendant was given a final discharge from his sentence and the parole on which he had been previously released. It thus appears that the questions raised by defendant in his petition have become moot. Having been granted his release from imprisonment, an order of the nature sought by him in his application for discharge on habeas corpus and certiorari would serve no useful purpose. A determination by this Court as to his right to the order sought has become unnecessary

This Court has also found that a habeas action is moot because the petitioner had his "full liberty" restored and thus the plaintiff would gain nothing from the relief requested:

> It is conceded by counsel that the respondent has been discharged from the asylum, and the criminal case against him nolle prossed. He is therefore in the full enjoyment of his liberty. He can gain nothing by reversal, for there is nothing to try if the case is reversed. An order releasing him would be a nullity, as he has been already released. There is no good purpose to be subserved by a determination of the case.

People v. Maguire, 115 Mich. 65, 66 (1897).

The federal courts follow the same general principle that mootness means the sought-after relief would prove ineffectual or meaningless. But this mootness standard is very strictly construed. To render a case moot, the intervening events must impact the relief requested in such a way as to make the relief requested completely ineffectual. In *Calderon v. Moore*, 518 U.S. 149, 150, (per curiam) (1996), the United States Supreme Court explained:

> [A]n appeal should therefore be dismissed as moot when, by virtue of an intervening event, a court of appeals cannot grant "any effectual relief whatever" in favor of the appellant. The available remedy, however, does not need to be "fully satisfactory" to avoid mootness. *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 13, (1992). To the contrary, even the availability of a "partial remedy" is "sufficient to prevent [a] case from being moot." .

In *Brewer v. Dahlberg*, 942 F.2d 328, (6th Cir. 1991), the court held that the parolee's habeas petition was not moot. There, a parolee, Brewer, claimed that he should have been discharged from Ohio parole one year after being released on parole, on the same date he was discharged from federal parole, based on the documents sent by the Ohio parole authority, and various other of its actions and omissions. At the time of discharge from federal parole, the Ohio parole authority had no reason to revoke or continue Brewer's parole. Three years after his federal discharge, Brewer committed multiple felonies. Subsequently, Ohio revoked his state parole based on the new criminal offenses, claiming he had never been discharged, and returned him to prison.

Brewer filed a habeas action in federal court, and by the time the case was decided in the appellate court, Brewer had been released from prison and reinstated on

his original parole. The parole authority argued the case had been rendered moot. The Sixth Circuit disagreed, stating:

> Respondent argues that the present case is moot because petitioner is no longer incarcerated. Respondent argues that even if this court were to find that it was unconstitutional for the OAPA [Ohio Adult Parole Authority] to revoke petitioner's parole and reincarcerate him, the remedy would be to reverse the decision to revoke petitioner's parole and return him to parole status. Since petitioner is no longer incarcerated for his parole revocation and is "out on parole" again, the judgment would merely return petitioner to his current status.
>
> However, contrary to respondent's contention, this is not the relief which petitioner seeks. Petitioner is asking this court to declare that he is no longer a parolee and should not be subject to the constructive custody of the OAPA, because his status as a parolee for the 1980 Ohio state conviction terminated on February 26, 1983. Petitioner is in essence arguing that because the conditions of his Ohio parole were unconstitutionally vague, the OAPA's actions in regard to petitioner after February 26, 1983 were invalid because they no longer had custody over him. Because petitioner is not merely asking that his parole revocation be declared invalid but also is asserting that he is no longer a parolee, this case is not moot. [*Id.* at 335.]

Similarly, in the instant case, Mr. Kenney is not merely asking that his parole revocation be declared invalid, he is also asserting that he is no longer a parolee, and has not been since April, 2008, when he should have been discharged but for the invalid revocation (for which Kenney spent over three years in prison). Thus, any actions by the Parole Board in regard to Mr. Kenney, including extending his parole until April 1, 2014, sanctioning him for failure to report, and continuing to make him abide by conditions of parole, are invalid because the parole board no longer has custody over him. Thus, nothing, short of discharge from parole should render Kenny's habeas action moot.

Kenney's habeas action is also not moot because he is asking this Court to

affirm the remedy granted by the trial court. As Defendant concedes, the writ of habeas corpus is equitable in nature. (Defendant's Response Brief p. 17.) Further, as the Sixth Circuit has noted, trial courts should normally be "given broad discretion in fashioning habeas corpus relief". *Gentry v. Dueth*, 456 F3d 687, 696 (CA 6 2006). And in *Burley v. Edwards*, 1987 U.S. Dist. LEXIS 15487 (E.D. Mich. Mar. 19, 1987) (SA pp.13-16), the court stated:

> Petitioner was reparoled on August 5, 1986. See attached certificate of parole. The current parole period extends until September 1, 1988. This new release, however, does not alter the previous revocation decision and does not moot petitioner's claims. Since petitioner is still on parole, he is still subject to the Parole Commission's jurisdiction. Martin v. Luther, 689 F.2d 109, 112 (7th Cir. 1982); Bell v. Kentucky Parole Board, 556 F.2d 805 (6th Cir. 1977), cert. denied, 434 U.S. 960 (1977); Orr v. Gunnell, 564 F.Supp. 792 (D. Conn. 1983). If petitioner's original parole was improperly revoked, he may be entitled to credit for the time served on the parole violation sentence. [*Id* p. 3, SA p. 15.]

The trial court did not abuse its discretion in fashioning the remedy of discharge from parole given the facts of this case. Kenney did not do anything that gave the parole board reason to revoke or extend his parole after being taken into custody on November 26, 2007, and his discharge date of April 18, 2008. Further, it would hardly be an abuse of discretion to give Kenney some credit for the three plus years he served on the parole violation sentence after his parole had been wrongfully revoked. Since Kenney is asking this Court to affirm the trial court's decision and remedy, the appeal is not moot.

II. PLAINTIFF'S PAROLE WAS NOT REVOKED AS A RESULT OF PLEADING GUILTY TO PAROLE VIOLATION FOR FAILING TO REPORT TO HIS PAROLE OFFICER A SINGLE TIME.

Plaintiff's parole was revoked because of the guilty finding of firearms possession following the parole revocation hearing of January, 2011, not because of the plea of guilty to a single failure to report to his parole officer which he tendered on January 30, 2008. MCL 791.240a(6) provides,

> If a preponderance of the evidence supports the allegation that a parole violation occurred, the parole board may revoke parole, and the parolee shall be provided with a written statement of the findings of fact and the reasons for the determination within 60 days after the paroled prisoner has been returned or is available for return to a state correctional facility."

MDOC Policy Directive 06.06.100AA provides:

> In all cases the final decision regarding revocation of parole shall be made by the parole board in accordance with administrative rule 791.7765. Whenever the parol board revokes parole, written findings of facts and the reasons for revocation shall be provided to the parolee within 60 calendar days after the parolee became available for return to the department.

In the February 22, 2011, parole board Notice of Action regarding the parole revocation that is the subject of the instant appeal, under the headings "Reasons in Support of Parole Board Action" the parole board listed "parole violation- the firearms violation shows a high potential of risk to the public." (SA, p. 9.) Thus, when the parole board listed its reason for revoking parole, as it is mandated to do by statute, administrative regulation and its own policy directives, the parole board listed only the gun charges as the reason for the revocation. In fact, Plaintiff asserts it would strain credulity to maintain that the parole board would revoke his parole for 60 months for a single failure to report that occurred some 40 months prior to the parole board's decision. Plaintiff's position is further buttressed by the fact that since being released

on parole, there have been at least two occasions where he has failed to report to his parole officer as required and in each instance, a revocation did not occur. He was sanctioned, but not with the extreme measure of revocation.

Further, while it is theoretically possible to revoke parole for a single failure to report, this is not the practice and Plaintiff was obviously sentenced to a 60 month sentence as a result of the gun charge, just as indicated in Form CSJ-290, not for a single failure to report. However, irrespective of what the parole board hypothetically could or could not do, the fact remains that it did not revoke Plaintiff's parole for the failure to report. As clearly evidenced in the notice of action containing the written reasons for the parole revocation, Plaintiff's parole was revoked as a result of being found guilty on the gun charge. Thus, Plaintiff's plea of guilty to the parole violation charge of failure to report did not result in a parole revocation and does not render moot his current habeas petition.

III. PLAINTIFF'S CURRENT PAROLE, WHICH IS INVALID, HAS NOT BEEN REVOKED, AND THE FAILURES TO REPORT TO HIS PAROLE OFFICER SINCE BEING RELEASED FROM PRISON AFTER THE PAROLE REVOCATION UNDER CHALLENGE, HAVE NOT AND WILL NOT RESULT IN REVOCATIONS, BUT MORE IMPORTANTLY THE PAROLE BOARD'S ACTIONS ARE INVALID SINCE IT HAS NO RIGHT TO CUSTODY OF PLAINTIFF IN THE FIRST INSTANCE.

Since Plaintiff was released from prison in June 2011, Plaintiff has failed to report to his parole officer on at least two occasions. Although MDOC has no right to custody of Plaintiff, he would note as follows: Plaintiff subsequently turned himself in to his parole officer after each failure to report. Each time, Plaintiff's parole was **not** revoked. Each time, Plaintiff was given a sanction short of revocation for the failure to report. (This is the typical punishment.) The first time included 30 days at the Detroit

Re-Entry Center (DRC) and the second time includes 30 days at the DRC to be followed by residential treatment. Since Plaintiff's "parole" was not revoked, it is irrelevant, for the purposes of determining mootness, whether it could have been revoked for any failure to report. Thus, Plaintiff's current habeas action, which seeks discharge from the underlying parole itself, which is the "restraint under which he is held" is not moot.

IV. PLAINTIFF IS CURRENTLY NOT SCHEDULED TO BE RELEASED FROM PAROLE UNTIL APRIL 1, 2014, AND THUS HIS HABEAS ACTION WILL NOT SOON BECOME MOOT.

On June 1, 2011, (after the circuit court granted Plaintiff's habeas action and discharged him from parole, and while the case was pending in the Michigan Court of Appeals), MDOC reinstated Plaintiff's parole. The original term was for 24 months. It has since been extended at the discretion of the parole board. MCL 791.236(3) provides:

> A parole order may be amended at the discretion of the parole board for cause. An amendment to a parole order shall be in writing and is not effective until notice of the amendment is given to the parolee.

There is no right to a hearing on such an amendment so long as the parolee's status of conditional liberty is not changed. *Lane v. Michigan Dep't of Corrections*, 383 Mich 50, 55 (1970).

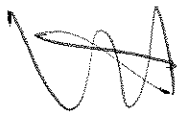
Since Plaintiff's term of parole was amended to add an additional 10 months, at the discretion of the parole board, Plaintiff is not scheduled to be released for parole until April 1, 2014. Thus, his habeas action will not soon become moot by potentially being released on June 1, 2011.

Furthermore, hypothetical events or contingencies that might effect a detainee's

in-custody status are irrelevant when determining mootness. In the parole context, it is not uncommon at all for parolees to be released prior to their current discharge date. If a habeas petitioner got an early discharge from parole while his habeas petition was pending, this case would be rendered moot. It would not matter that the action was started or pending when the original discharge date was in effect. Conversely, a parole term can be extended at the discretion of the parole board at any time before the discharge order is received by the parolee. *People v. Holder*, 438 Mich. 168, 173 (2009). Thus, when a person is in custody by virtue of being on parole, the fact that his discharge date, which is no guarantee he will be released, is fast approaching does not render a habeas proceeding moot. Further, as explained above, any parole sanction, such as the 10 month extension, that stems from the original parole, from which Mr. Kenney should have been discharged, should not render moot this habeas action since Kenney should have been discharged from parole in the first instance. This is especially true when the alleged violations did not result in detentions independent from the parole violation, such as a new sentence on a criminal conviction which would result in a detention beyond his release date. (However, even then, there could be collateral consequences preventing the case from being moot.)

Accordingly, Plaintiff's habeas action is not moot, and will not soon become moot.

Respectfully submitted,



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